International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 769, AFL-CIO *and* Barboursville Bridge Co. Case 9-CD-398

March 4, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Barboursville Bridge Co. (herein called the Employer), alleging that International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 769, AFL-CIO (herein called the Ironworkers), had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to the Employer's employees who were performing the work, some of whom are members of the Laborers' District Council of Charleston, West Virginia, affiliated with the Laborers' International Union of North America, AFL-CIO (herein called the Laborers), some of whom are members of Carpenters Local Union 302 of Huntington, West Virginia, United Brotherhood of Carpenters and Joiners, AFL-CIO (herein called the Carpenters), and some of whom have no affiliation with any labor organization.

Pursuant to notice, a hearing was held before Hearing Officer Bruce H. Meizlish on October 31, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1] Thereafter, the Employer filed a brief; that brief, and the positions of the parties as stated at the hearing, have been duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a West Virginia corporation with its principal place of business in Barboursville, West Virginia, is engaged in the business of highway and bridge construction. During the past year, the Employer purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of West Virginia. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Ironworkers, the Laborers, and the Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer is the general contractor, pursuant to a contract with the West Virginia Department of Highways, in the construction of steel-reinforced concrete support columns which will support a planned elevated approach highway to a bridge across the Ohio River. The contract for the Employer's portion of the East Huntington Bridge project was let about December 1980. The Employer thereafter assigned its own employees, some of whom are members of the Laborers, some of whom are members of the Carpenters, and some of whom are not affiliated with any labor organization, to perform the work of setting and tying steel reinforcing rods and attendant excavation and concrete work. Work began on the project about December 1980.

Between early September and September 17, 1981, the Ironworkers business representative met with the Employer's job superintendent and was told that the Employer was not interested in using and did not intend to use ironworkers on the project. From September 17 through September 25, 1981, the Ironworkers picketed the Employer's jobsite with signs which read as follows: "For the Public Information. Barboursville Bridge Co. does not employ Ironworkers to perform ironwork on this job." On the morning of September 18, there were about 10-15 pickets at the gate to the jobsite and, on September 22, there were about 15-20 pickets at the gate to the jobsite. As a result of the picketing, the Employer's employees did not cross the picket line during the morning of September 18 and on September 22. Prior to the picketing on September 22, two ironworkers, who had been working on another job in the area, informed the Employer's vice president that the Ironworkers

[1] Neither the Laborers nor the Carpenters entered an appearance as a party at the hearing.

wanted the work and that the Employer could get rid of the pickets if the union hall was called for ironworkers. Also, on September 22, after an altercation at the picket line in which a picket punched the Employer's vice president, the Ironworkers business representative approached the Employer's vice president and sought to resolve the dispute by having ironworkers employed to work with the reinforcing steel. At the hearing, the Ironworkers business representative testified that, had the Employer employed ironworkers, there would not have been picketing.

On September 23, the Employer and the Ironworkers agreed to the entry of a state court injunction order which, *inter alia*, limited the number of pickets at the Employer's worksites and prohibited blocking of the entrances or exits of the worksites. Since September 25, there has been no picketing of the Employer's jobsites by the Ironworkers, and the Employer's employees have continued to perform the disputed work.

B. *The Work in Dispute*

The work in dispute involves the ironwork, more specifically the placement and binding together of steel rods or mesh used as reinforcement in the construction of concrete support columns, at the construction site at the East Huntington Bridge project in Huntington, West Virginia.

C. *The Contentions of the Parties*

The Ironworkers contends that its picketing was for informational purposes, that the Laborers and the Carpenters have each disclaimed interest in the disputed work, and that the disputed work should be awarded to the Ironworkers because it traditionally falls within the Ironworkers jurisdiction and ironworkers possess the requisite skills to perform the work.

The Employer takes the position that there is no basis for assigning the disputed work to the Ironworkers. It argues that it has no collective-bargaining agreement with the Ironworkers, or any other labor organization, that its assignment of the work was in accord with its own past practice and the area practice, and that it is more efficient and economical to have its employees perform the disputed work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

Despite the fact that the Ironworkers picket signs referred to "For the Public Information," the record shows that the Ironworkers business representative has, prior to, during, and since the picketing, informed the Employer that it sought the disputed work for its members and has also, both during the picketing and at the hearing, indicated that the picketing was for that object. Accordingly, based upon all the evidence, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

As noted above, the Ironworkers contends that the Laborers and the Carpenters have disclaimed an interest in the disputed work. Such disclaimers are ineffective, in the context of this case, to affect the existence of a dispute inasmuch as neither labor organization is recognized or certified as the collective-bargaining representative of the Employer's employees and the Employer's employees have continued to perform the disputed work. See *Sheet Metal Workers' International Association, Local 12, AFL-CIO (Builders Association of Eastern Ohio and Western Pennsylvania)*, 203 NLRB 141, 142 (1973).

Further, neither party contends, and the record contains no evidence showing, that there exists any agreed-upon method for the voluntary adjustment of the dispute.

On the basis of the entire record, we conclude that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[2] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[3]

1. Certification and/or collective-bargaining agreements

The record shows that none of the labor organizations involved herein, or any other labor organization, has been certified to represent any of the Employer's employees. Nor does the Employer

[2] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[3] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

have a collective-bargaining agreement with the Ironworkers, the Laborers, the Carpenters, or any other labor organization. The Employer has entered into what it refers to as participation agreements with the Laborers, the Carpenters, and Local Union No. 132, International Union of Operating Engineers, AFL-CIO (herein called the Operating Engineers). The agreements with the Laborers and the Operating Engineers obligate the Employer to make payments into the fringe benefits funds of those labor organizations on behalf of those of its employees, respectively, who are members of those labor organizations. The agreement with the Carpenters obligates the Employer to employ members of the Carpenters on the East Huntington Bridge project and on other jobs involving work covered by the geographical and work jurisdiction of the Carpenters, and also obligates the Employer to pay certain wages and fringe benefits for those Carpenters members which it employs. While the Laborers business manager and the Carpenters business agent both testified that their respective unions do not make a jurisdictional claim to the disputed work, both acknowledged that their members have performed the disputed work in the area. It is, accordingly, clear from the record that the factors of certification and contract are not determinative of the assignment of the disputed work herein.

2. Company preference, past practice, and area practice

The Employer, at the hearing and in its brief, has expressed its preference that the disputed work continue to be performed by its own employees. While we do not afford controlling weight to this factor, we find that it tends to favor an award of the disputed work to the Employer's employees currently performing the work.

Throughout the period since 1973, when the Employer began operations as a highway and bridge construction contractor, the Employer's consistent practice has been to assign the same type of work as the disputed work herein to its own carpenter and laborer employees; the Employer has never assigned such work to ironworkers.

While there is a conflict reflected in the record as to the percentage of highway bridge construction work performed in the three surrounding counties by contractors who do utilize ironworkers, the record does reflect that the Employer, one of the largest highway bridge contractors in Huntington, West Virginia, is among approximately four area contractors who utilize laborer and carpenter employees to perform the disputed work.

Accordingly, in view of the above, we find that company practice favors the continued assignment of the disputed work to the Employer's employees.

3. Relative skills

The record indicates that both the Employer's employees and the ironworkers possess the necessary skills to perform the work. While the Employer's employees, most of whom have worked for the Employer for more than 1 year and one job, have not qualified by way of an apprenticeship program such as that of the Ironworkers 3-year apprenticeship program which is primarily on-the-job training with some related training, the Employer's vice president testified that it takes a few months to become proficient at the work and that the Employer does have some training requirements. Further, it is noted that there is no state certification requirement for the performance of such work although the reinforcing steel is inspected by state highway department inspectors before the concrete is poured.

4. Economy and efficiency of operation

William Turman, president of another bridge and highway construction company in the area and also an advisor to the Employer, testified that contractors such as himself and the Employer could not remain competitive using ironworkers to perform steel reinforcing work; he stated that by not employing ironworkers, who seek costly on-the-job and fringe benefits, contractors such as himself and the Employer can compete for many smaller jobs. The Employer's vice president also testified that the costs engendered on the jobs which the Employer has performed generally have followed the original estimates for the jobs.

Finally, the record shows that the disputed work constitutes only about 10 percent of the worktime on the job and does not necessarily fill entire days or occur consecutively. Thus it is more efficient for the Employer to continue to utilize its own employees performing a variety of job duties. This enables the Employer to maintain a more stable work force.

Accordingly, it appears that the factors of economy and efficiency of operation favor the assignment of work to the Employer's employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees of the Employer who are presently performing the disputed work of placing and binding together steel reinforcing rods or mesh in the construction of concrete support columns at

the construction site at the East Huntington Bridge project in Huntington, West Virginia, are entitled to perform such work. We reach this conclusion relying on the Employer's practice and preference and the economy and efficiency of the current assignment. In making this determination, we are awarding the work in question to employees of the Employer who have performed the disputed work, but not to any union of which they are members or, in general, to the members of any such union. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of the Employer who are currently performing the disputed work are entitled to perform the ironwork at the construction site at the East Huntington Bridge project in Huntington, West Virginia.

2. International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 769, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Barboursville Bridge Co. to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 769, AFL-CIO, shall notify the Regional Director for Region 9, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.